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Supreme Court of the United States

OCTOBER TERM, 1950

No. 251

WALTER H. DUISBERG,

Petitioner,

v.

THE UNITED STATES.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Respondent moved in the court below to dismiss the petition therein on the grounds of (1) lack of jurisdiction, (2) legal insufficiency, and (3) *res judicata.*

Upon the argument of its motion, respondent did not press ground "2". In addition to grounds "1" and "3", respondent urged dismissal upon the ground of election of remedies.

The court below dismissed the petition on the ground of lack of jurisdiction. With respect to the other two grounds which had been presented to it, the court below stated only (R. 12):

> "Having concluded that this court lacks jurisdiction to entertain this suit, it is not necessary for us to consider the doctrines of *res judicata* and election of remedies which the parties ably presented in their briefs."

Since the court below made no determination adverse to petitioner on those two questions, petitioner was in no position to urge error with respect thereto as ground for certiorari. Petitioner's supporting brief was consequently silent thereon.

Respondent has now opened up those two questions in this court. No criticism of respondent is implied in pointing out that thereby the possibility has arisen that some Justice of this court who may be of the opinion that certiorari should be granted on the point actually determined below might decline to grant it because of a belief that the determination below was correct on some other ground not considered by the lower court.

Respondent presents its argument with respect to both of those questions in only one paragraph (Br. 15-16). The thoroughness of treatment which they should receive in this reply brief presents a delicate problem. Although casually raised, these new issues must be met. This cannot be adequately done without extended analysis, for which petitioner craves this court's indulgence.

POINT I

Respondent has failed to meet petitioner's arguments on the issue of jurisdiction.

Petitioner's main brief presented four grounds why a writ should be granted to review the lower court's disclaimer of jurisdiction, to wit:

(1) The inconsistent position heretofore taken by the government in the very case at bar upon that question;

(2) The position that the lower court has jurisdiction of a claim such as that at bar heretofore taken in many other cases by experienced, intelligent and sincere government counsel;

(3) The dictum of this court in the *Uebersee* case and the opinions expressed by other authorities recognizing the lower court's jurisdiction to entertain the claim at bar; and

(4) The erroneous analysis in the opinion below of the three prior Court of Claims cases dealing with this problem.

The opposing brief disposes of those four points as follows:

(1) Respondent's brief ignores petitioner's Point I in its text, but refers to it glancingly in one paragraph of a footnote at the base of page 12.

(2) Respondent's brief ignores petitioner's Point II in its text, but refers to it glancingly in one paragraph of a footnote at pages 11-12.

Respondent's footnote purports to explain away all of the authorities cited in petitioner's Point II as being cases where the property belonged to a friendly alien, and not to an American citizen (Br. 12). That this casual treatment of the Point is unwarranted becomes manifest upon consideration of the fact that in *Draeger Shipping Co., Inc.* v. *Crowley*, 49 F. Supp. 215 (D. C. S. D. N. Y. 1943), which was one of the cases cited in that Point, paintiff *was* an American citizen.

Although the plaintiff in that case clearly had available the remedy of suit under § 9(a), the Alien Property Custodian urged that the Court of Claims had jurisdiction to make compensation for the property which had there been appropriated for public use.

Consequently, respondent is lamentably in error when it offhandedly states in its footnote (Br. 11-12) that

> "*The government has never taken the position*, for which petitioner is here contending, that the Tucker Act remedy was an alternative available in cases in which the remedy of Section 9(a) was also available."

The government most decidedly *did* take that position in the *Draeger* case.

(3) Respondent's brief ignores all of the authorities cited in petitioner's Point III, except the *Uebersee* case. Respondent argues that this court's dictum in the *Uebersee* case indicates that the government is correct in its present position, but respondent does not challenge petitioner's contention that the ambiguity of this court's *Uebersee* dictum warrants certiorari so that this court may determine this important question and resolve the conflicting authorities.

(4) Respondent's brief completely ignores petitioner's Point IV, which demonstrated beyond possibility of contradiction that the court below had misread its own three prior decisions on this problem, which it cited in support of its decision herein. If respondent had had even a single word to say in support of the correctness of the lower court's citation of its three prior decisions, it may safely be presumed that respondent would have attempted to justify the lower court's citations.

POINT II

Petitioner's petition in the Court of Claims was not barred by the doctrine of election of remedies.

Respondent urges that "a suitor who pursues a choice of inconsistent remedies is bound by his election even if the remedy chosen be not efficacious" (Br. 15).

Respondent is in error both in urging that the remedies sought in the District Court action and in the Court of Claims action were inconsistent, and in urging that the institution and discontinuance or dismissal of a suit without trial constitutes an election so as to bar a party from enforcing another remedy, even if the two remedies be inconsistent.

A. The two suits did not seek inconsistent remedies.

Respondent's *complete* argument to the effect that the remedies sought in the District Court action and in the Court of Claims action were inconsistent reads (Br. 15):

> "We think it obvious that the two suits are inconsistent. Whereas an action brought under Section 9(a) for the return of the property proceeds on the theory that the claimant is entitled to the property and that Congress did not authorize the Alien Property Custodian to retain the property mistakenly taken by him, an action under the Tucker Act for just compensation lies on the theory that the taking is authorized and that title remains in the United States."

Respondent is in error in asserting that the one action recognizes title as vested in the United States whereas the other action does not.

It has been expressly adjudicated that *absolute title* to property seized by the Alien Property Custodian vests in the United States at the moment of seizure and that legal title thereto may be transferred by the United States to others. See:

> *United States* v. *Borax Consol., Ltd.*, 62 F. Supp. 220, 223 (D. C. N. D. Calif. 1945);
> *The Pietro Campanella*, 47 F. Supp. 374, 377 (D. C. D. Md. 1942).

Consequently it is clear from the authorities that both actions were predicated upon the fact that property of petitioner, an American citizen, had been seized by the Alien Property Custodian and that absolute title thereto had by such act been vested in the United States.

There was no difference in the facts which petitioner was required to prove in order to sustain the two suits. The only difference was in the remedies sought. In the first action, petitioner sought to reacquire the property. In the second action, petitioner sought just compensation for its taking. In neither suit did petitioner take a position inconsistent with that taken in the other.

To test the reasonableness of respondent's contention that it is *"obvious"* that the two suits were inconsistent, let us revert to the hypothetical decayed fish case presented in petitioner's main brief.

That hypothetical case was thus presented: The United States seizes a cargo of fresh fish which the Alien Property Custodian mistakenly believes to belong to an alien enemy, although it actually belongs to a loyal American citizen. At the moment of seizure the property is worth $10,000. A week later, when the property has declined to a value of $100 (as fertilizer), the Alien Property Custodian recognizes his error and returns the fish.

In petitioner's main brief it was urged that the owner has a claim to secure just compensation for the seizure, under the Fifth Amendment and 28 U. S. C. § 1491, and that the return of the fish, now worth only 1% of its value at the date of seizure, does not completely satisfy the obligation of the government under all applicable statutes. In short, that the remedy of return of the property itself, afforded by § 9(a) of the Trading with the Enemy Act, was not intended as a *substitute* for the pre-existing remedy of just compensation, but was intended as an *additional* remedy available to owners in those instances where their interests might be better served by compelling a return of the property itself.

Respondent's argument is, in effect, that if the owner in that hypothetical case commenced a suit for the return of his cargo of fish, but recognizing a week later that the return of the fish in their then decayed state would fail to make him whole, abandoned his suit for return under § 9(a) and commenced suit in the Court of Claims for just compensation, the two suits would be *"obviously"* inconsistent.

Respondent is proceeding on the fallacious assumption that *merely because a plaintiff may not recover twice for the same wrong,* suits seeking two different remedies for the same wrong are necessarily inconsistent. The true test of inconsistency is whether, in order to sustain one of the

suits, plaintiff must allege and prove facts which he would be required to disprove in the other suit.

In analyzing this problem, it is appropriate to note that the doctrine of election of remedies is one that is not favored by the courts and is to be applied only where its application is inescapable. See *Friederichsen* v. *Renard,* 247 U. S. 207, 62 L. ed. 1075 (1918), where this court stated (at 213):

> "At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended."

In view of the utter inapplicability of the doctrine of election of remedies to the situation at bar, petitioner will cite only a few cases which illustrate the non-application of the rule in situations analogous to that at bar.

In *Whitney* v. *Parish of Vernon,* 154 S. W. 264 (Texas 1913), the court stated (at 267):

> "The doctrine of election of remedies applies in a case in which a plaintiff has the right to choose between two modes of redress which are so inconsistent that the assertion of one is necessarily a repudiation of the other. * * *
>
> "There is no inconsistency in the position assumed by appellant in seeking to recover upon a quantum meruit and in that assumed by him in his suit upon the contract. The pursuit of one of these remedies cannot be regarded as a repudiation of the other."

In *Abramson* v. *Leo,* 240 App. Div. 343, 269 N. Y. Supp. 814 (1934), plaintiff first instituted an action for rescission of an agreement, and then instituted an action for fraud resulting in the execution of the agreement. The court stated (at 357-358):

> "Assuming that plaintiff had such a remedy [for rescission], it is clear that it was wholly inadequate and that an action to recover damages for fraud was the proper remedy. * * *

> "The basis for both actions was fraud. The damages asked were damages because of a fraud, and there was no election for the reason that the plaintiff did not take an inconsistent position. [Cases cited.]"

Smith v. *Bricker,* 86 Iowa 285, 53 N. W. 250 (1892), presented the reverse of the preceding situation—plaintiff first instituted an action for fraud resulting in the execution of an agreement, and then instituted an action for rescission of the agreement. The court stated (at 290):

> "It is true, that a right to impeach a transaction on the ground of fraud may be lost by electing to affirm the contract. But in this case the action at law did not affirm the agreement in the sense that the plaintiff sought to take advantage of the contract. He demanded no more nor no less than he does in the petition in equity. He sought in one action, as in the other, to save himself from loss by reason of the voidable contract."

The instant situation is closely analogous to the above-cited cases, in which it was held that the remedies sought were entirely consistent. Both the suit in the District Court to recover the property itself and the suit in the Court of Claims to secure just compensation for its taking were predicated upon petitioner's contention that he, an American citizen, was the sole and absolute owner of the property seized by the Alien Property Custodian.

But even if the two proceedings had sought inconsistent remedies, the law is clear that the mere institution and failure to proceed with petitioner's first action in the District Court would not constitute such election of remedies as to bar maintenance of his subsequent petition in the Court of Claims.

B. The institution and discontinuance or dismissal of a suit without trial does not constitute such election of remedies as to bar a party from enforcing another remedy, even if the two remedies be inconsistent.

In *Register* v. *Carmichael,* 169 Ala. 588, 53 So. 799 (1910), plaintiff's first suit sought a dissolution of an alleged partnership with defendant and an accounting of its affairs. A receiver had been appointed in that suit and an appeal with respect thereto was still pending when plaintiff instituted her second suit to recover the purchase price of her interest in the partnership property, which she alleged she had sold to defendant. The court held that the institution of the first suit did not constitute an election of remedies, stating (at 590):

> "The theory of the appellant is that plaintiff was estopped to sue on the cause of action alleged, because she had elected by her bill in chancery to assert an antagonistic right. But an election, to be conclusive, must be efficacious to some extent at least. The mere bringing of a suit is not determinative of the right. The party against whom the estoppel is pleaded must have received some benefit under his election. [Cases cited.]"

In *Herdan* v. *Hanson,* 182 Calif. 538, 189 Pac. 440 (1920), plaintiff's first suit was for rescission of a contract; his second was for damages for fraudulent representations. The court held that the second suit might be maintained upon abandonment of the first, stating (at 541-543):

> "It is insisted, upon behalf of appellant, that a party having two inconsistent, concurrent remedies may not pursue both, but must choose between them and, having clearly elected to proceed upon one, is thereby bound and will be estopped from invoking the other. * * *
>
> "It is insisted, * * * upon behalf of appellant, that plaintiff's cause of action should be barred in the present case by his prior election of remedies, for the reason that the action for rescission failed not because plaintiff attempted to select a remedy to which he was not entitled, *but because of his own neglect in omitting to*

comply with the conditions prerequisite to the granting of the relief prayed for by him.

"The answer to this contention is that the principle of election is founded upon the theory that a party should not be allowed to occupy inconsistent positions (Bigelow on Estoppel, 6th ed., p. 732), whereas, *the effect of the judgment of nonsuit in the prior action was merely to leave the plaintiff and defendant in the same relative position as before the action was commenced.* * * *

"It follows that, inasmuch as the attempted prior election of the plaintiff was arrested and rendered abortive before he had proceeded to a point absolutely incompatible with the institution and maintenance of the present action, the principle of estoppel arising from an election of inconsistent remedies cannot be invoked and applied."

In *Gorman-Head Auto Co.* v. *Barrett,* 78 Okla. 34, 188 Pac. 1083 (1920), the court permitted maintenance of an action for the purchase price after a suit to rescind had been abandoned, stating (at 36):

"No rights were secured under the petition asking for cancellation, nor has the defendant been in any way damaged thereby."

In *First National Bank* v. *Flynn,* 190 Minn. 102, 250 N. W. 806 (1933), the court stated (at 105):

"We are now definitely in line with the view that mere commencement of an action or proceeding which, if carried to its usual conclusion would constitute an election, will not have that effect, assuming that the adverse party has not changed his position or been otherwise prejudiced. [Cases cited.]"

In *McMahan* v. *McMahon,* 122 S. C. 336, 115 S. E. 293 (1922), the court stated (at 342):

"When a certain state of facts under the law entitles a party to alternative remedies, both founded upon the identical state of facts, these remedies are not considered inconsistent remedies, though they may not

be able to 'stand together' the enforcement of the one remedy being a satisfaction of the party's claim. In such case the invocation of the one remedy is not an election which will bar the other, unless the suit upon the remedy first invoked shall reach the stage of final adjudication, or unless by the invocation of the remedy first sought to be enforced the plaintiff shall have gained an advantage thereby or caused detriment or change of situation to the other."

Respondent's brief (p. 15) cites *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 67 L. ed. 261 (1922), as purportedly standing for the proposition that the mere institution of a suit constitutes an election of remedies regardless of the further course of the litigation. The case does not stand for that proposition. This court therein affirmed the doctrine of the cases above cited, stating (at 297-301):

> *"The mere filing of the bill in the first suit, according to many authorities, did not constitute an irrevocable election.* But upon ascertaining from their plea that the defendants intended to rely upon the statute of limitations, and having knowledge of the facts upon which that plea was founded and thereafter sustained, the plaintiff in error had fairly presented to it the alternative: (a) of abandoning that suit and beginning an action at law * * * ; or (b) of proceeding with the original case upon the issues as they stood. The plaintiff in error deliberately chose the latter alternative. * * *
>
> "The distinguishing feature of the instant case is that after the coming in of the answer, pleading the statute of limitations, and the plain warning thus conveyed of the danger of continuing the equity suit further, the plaintiff in error persisted in pursuing it to final judgment, instead of promptly reforming the cause or dismissing the bill and seeking the alternative remedy not subject to the same defense. * * * The plaintiff in error, in bringing the original suit, and in continuing after the plea in bar to follow it to a final determination, made an irrevocable election, and * * * it is now estopped from maintaining the present inconsistent action."

It will thus be seen that this court has *not* held that the mere institution of suit and subsequent motion by plaintiff for a voluntary nonsuit before trial constitutes an irrevocable election of remedies.

POINT III

Petitioner's petition in the Court of Claims was not barred by the doctrine of *res judicata.*

Respondent argues that, by virtue of Rule 41(b) of the Federal Rules of Civil Procedure, the dismissal of petitioner's District Court action *"was* an adjudication on the merits which precludes a suit for just compensation" (Br. 16).

Respondent's position is predicated upon a misunderstanding of the meaning of an order entered, under Rule 41(b), dismissing an action "with prejudice" although there has in fact been no trial upon the merits and no adjudication of any issue raised by the pleadings.

Res judicata is of two types: (1) that in which the subsequent action between the same parties or their privies is upon the same cause of action; and (2) that in which the second action between the same parties or their privies is upon a different cause of action. These two types are sometimes referred to as (1) *res judicata* of the case, and (2) *res judicata* of the issues.

Where the subsequent suit is upon the identical cause of action pleaded in the first, not only the issues which were *actually* tried and determined, but any which *could* have been tried and determined are deemed to have been adjudicated.

Where the subsequent suit is upon a different cause of action than the first, only those issues actually tried and determined are deemed to have been adjudicated.

If this distinction is kept in mind when Rule 41(b) is considered, it will be seen that this court, in promulgating

that rule, did not intend that its language should form the basis for a plea of *res judicata* of issues where the dismissal was before trial for failure to prosecute. In such case, where no proof has been introduced and no issues have been determined, it is patently impossible for any court to find *res judicata* of issues which may be presented in a subsequent action.

Rule 41(b) does *not* say that a dismissal without trial, unless the court otherwise specifies, *is* an adjudication on the merits. Rule 41(b) says that, unless the court otherwise specifies, a dismissal thereunder shall *"operate as"* an adjudication on the merits.

To have said that something that *is not* an adjudication on the merits *is* an adjudication on the merits would have been to say that black is white. This the rule did not do. The rule merely provides for certain consequences of the entry of an order thereunder, to wit, that further maintenance of *the suit thus dismissed* shall be as completely barred *as if* there had been an adjudication on the merits.

It does not follow therefrom that Rule 41(b) requires a court to treat a dismissal thereunder as if *the issues* pending before the court had actually been tried and adjudicated. The principles of *res judicata* neither require nor permit such consequences to flow from a dismissal "with prejudice" before trial.

In *Hughes* v. *United States*, 71 U. S. 232, 18 L. ed. 303 (1866), this court pointed out that in order for a judgment in one suit to constitute a bar to another suit, the judgment in the first suit must have been rendered on the merits. This court stated (at 237):

> "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, *and must be determined on its merits.* If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, *or was disposed of on any ground which*

> *did not go to the merits of the action,* the judgment rendered will prove no bar to another suit. [Cases cited.]"

The judgment of dismissal of the District Court action previously instituted by petitioner was upon a ground "which did not go to the merits of the action," and consequently it did not adjudicate any of *the issues* raised in the case at bar.

The record of the District Court action discloses that, although the issues of petitioner's American citizenship and of his sole and absolute ownership of the property in question were raised by the pleadings in that suit, those issues were not determined by the District Court, nor, in fact, did that court hear any evidence upon which it *could* have determined those issues (R. 2).

All that the District Court determined was that petitioner had disobeyed the court's direction that he proceed to present his evidence, and that in consequence he was to be penalized by being forbidden to maintain that suit or any other suit for the same relief [*the return of his property under § 9(a)*]. With respect to the substantive issues involved, petitioner was in no different position than if he had never commenced his suit and had never sought the return of his property, but had merely gone directly to the Court of Claims to seek compensation for its taking.

In support of its position that the dismissal "with prejudice" of petitioner's District Court action bars the maintenance of the instant action, despite the fact that there was no trial on the merits of the District Court action, respondent cites *Escher* v. *United States,* 68 C. Cl. 473 (1929), cert. den. 281 U. S. 752, 74 L. ed. 1163 (1930), and *Reading* v. *Atchison, T. & S. F. Ry. Co.,* 7 F. R. D. 664 (D. C. N. D. Ill. 1947). Neither case is in point.

In the *Escher* case, plaintiffs had *a full trial in the District Court to recover the value of their seized property, recovered judgment therein, and were paid the amount of the judgment obtained by them under § 9 of the Trading*

with the Enemy Act, after which they brought a second suit in the Court of Claims for the purpose of increasing their recovery. The facts in that case were patently dissimilar from the facts of the instant case, and the determination in that case is not authority for respendent's contention.

In the *Reading* case, the second action was commenced *for the identical relief, for the identical wrongs* complained of in the first action, which had been dismissed for want of prosecution. The holding therein that the second action falls within the ban of the rule of *res judicata of the case* is of no relevancy to the instant situation, where the problem involved is that of *res judicata of issues.*

It has been held that the provision of Rule 41(b) that a dismissal with prejudice shall "*operate as*" an adjudication on the merits is not the equivalent of saying that such a dismissal *is* an adjudication on the merits.

See *Russo* v. *Sofia Bros., Inc.,* 2 F. R. D. 80 (D. C. S. D. N. Y. 1941), where the court stated (at 81-82):

> "It is pointed out by Professor Moore that *the objective of the new rules is to secure a disposition of litigation on the merits* rather than by collateral methods. Rule 1, F. R. C. P., dictates that the rules shall be construed to secure the just, speedy, and inexpensive determination of every action. * * *
>
> "*Clearly, there has been no trial of the issues.* * * * In other words, *objectively considered, there has been no disposition of plaintiff's claim on the merits.* Are we constrained *by a fiction* to so treat it by the command of Rule 41?
>
> "I have searched vainly for a judicial interpretation of its language as it affects the problem here presented. The Notes of the Reporter to the Advisory Committee on the rules read: 'Note to subdivision (b). This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.' * * *

> "The compilation of data gleaned from the Symposia on the Rules under the Auspices of the American Bar Association * * * reveal the Rule in its primary function, as a device during trial to prevent the recurrence of litigation that had reached that advanced stage.
>
> "The place that this rule occupies in the numerical order of the rules, as part of Chapter VI, entitled Trials, rules 38-53, tends to characterize it primarily as controlling the action at or after the trial.
>
> "To extend the operation of this rule to the instant motion would, I believe, *create a penalty and a forfeiture which was not contemplated by the framers of the Rules.*"

Any other ruling than that which was made in the foregoing case would raise the serious question as to whether this Court, in promulgating Rule 41(b), exceeded the authority vested in it by Congress under 28 U. S. C. § 2072, which provides:

> "Such rules shall not abridge, enlarge or modify any substantive right."

If the determination in the *Russo* case were to be rejected, there would be posed the question as to whether even this court has the power to promulgate a rule which provides that, merely for the purpose of controlling its calendar, a district court may deprive a party of his cause of action and thereby impose upon him a penalty out of all proportion to the damage done to the opposing party by the failure to prosecute and out of all proportion to the damage done to the judicial process by interference with its calendar.

If *anything* may be deemed to be fundamental in our judicial system it is that the right of a litigant to an adjudication upon the merits, despite any violation of court rules of which he may have been guilty, is a "substantive right."

No case has been found in which any court has determined whether Rule 41 (b), were it to be construed otherwise than as it was construed in the *Russo* case, would abridge peti-

tioner's "substantive rights" under the circumstances of the present situation. However, there have been a number of cases in which district courts have held that various other Rules of Civil Procedure abridge "substantive rights" and consequently are unenforcible despite the promulgation of such rules by this court. Among such cases are:

Francis v. *Humphrey*, 25 F. Supp. 1 (D. C. E. D. Ill. 1938);

Melekov v. *Collins*, 30 F. Supp. 159 (D. C. S. D. Calif. 1939);

Carby v. *Greco*, 31 F. Supp 251 (D. C. W. D. Ky. 1940).

The issue as to the power of this court to promulgate Rules 35 and 37 of the Rules of Civil Procedure came before this court in *Sibbach* v. *Wilson & Co., Inc.*, 312 U. S. 1, 85 L. ed. 479 (1941), where this court held that those rules do not abridge the "substantive right" of any litigant and consequently are valid. The significant feature of that case for present purposes is that this court recognized that even the fact that the rules were promulgated by the highest court itself does not bar inquiry into the validity of the promulgation of such rules when such question is subsequently raised *in an adversary proceeding.*

In view of the cogent reasoning in the *Russo* case, it is submitted that this court need never reach the question as to whether Rule 41(b), if otherwise construed, would unlawfully abridge petitioner's "substantive rights"; but were it necessary for this court to consider that problem, petitioner submits that there can be no question but that a court rule which declares that a dismissal without trial constitutes an adjudication upon the merits is an attempt to declare that black is white.

It constitutes an abridgement of "substantive rights" for a court to enact a rule that, as a punishment for a party's failure to proceed to trial, the dismissal of his action *shall be an adjudication upon the merits*, even

though in point of fact there has been no trial and *there has been no adjudication upon the merits.*

It is, therefore, clear that there has been no prior adjudication of petitioner's claim and that the defense of *res judicata* has been improperly raised.

CONCLUSION

Respondent has utterly failed to meet the argument presented by petitioner's main brief. Even if respondent were correct in its position that the Court of Claims does not have jurisdiction of the case at bar, the conflicting authorities and dicta on this subject, as well as the inconsistent position heretofore taken by the government both in the case at bar and in many other cases, demonstrate that this is a situation warranting certiorari so that this court may determine this important question.

The alleged defenses of election of remedies and of *res judicata* are without merit.

Regardless of this court's ultimate determination on the question here presented, the granting of certiorari is clearly warranted.

Respectfully submitted,

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